

FEDERAL COMMUNICATIONS COMMISSION

Washington, D. C. 20554

MAR 22 2016

OFFICE OF
MANAGING DIRECTOR

Mr. Leonard Fink
MessageBank
250 West 57th Street, Suite 1100
New York, NY 10107

Licensee/Applicant: **MessageBank**
Waiver and Refund Request: Late Payment Penalty
Disposition: **Dismissed and Denied** (47 U.S.C. §
159(c)(1); 47 C.F.R. §§ 0.401, 1.7, 1.1164, and
1.1166)
Station: N/A
Fees: Fiscal Year (FY) 2015 Late Payment Penalty
Date Request Submitted: Sep. 28, 2015 (*rec'd* Oct.
5, 2015)
Date Regulatory Fee Paid: Sep. 28, 2015
Date Late Regulatory Fees Paid: Sep. 28, 2015
Fee Control No.: RROG-15-00016078

Dear Mr. Fink:

This responds to Licensee's *Request*¹ for a waiver and refund of the amount of the statutory penalty, which was imposed when Licensee failed to pay the Fiscal Year (FY) 2015 regulatory fee by the deadline. As we discuss below, we dismiss because Licensee's submission fails to comply with Commission filing procedures, and we deny because Licensee fails to demonstrate legal grounds or most extraordinary circumstances to waive collection of the penalty and assessed charges of collection.

Background

On September 2, 2015, the Commission announced by *Public Notice*² that "regulatees at their own discretion, may submit payments at any time" using the Commission's automated filing and payment system (Fee Filer); however, "[d]ue to already scheduled maintenance, Fee

¹ Letter from Leonard Fink, MessageBank, 250 West 57th St., Suite 1100, New York, NY 10107 to Federal Communications Commission, Attn: Office of the Managing Director--Reg. Fee Waiver/Reduction Request, 445 12th St., S.W.--Room TW-B204, Washington, DC 20554 (*dated* Sep. 28, 2015; *rec'd* Oct. 5, 2015)(*Request*). Licensee included a copy of an email from paygovadmin@mail.doc.twai.gov to lfink@messagebank.com (Sep. 28, 2015)(Subject: Pay.gov Payment Confirmation: Remittance Advice); FCC Fee Filer Confirmation Report (9/28/2015). Licensee's submission to the FCC, does not comply with the Commission's rule requiring filing with the Commission's Secretary (47 C.F.R. § 1.1166(a)(2)).

² Fee Filer is Open for Payments of FY 2015 Regulatory Fees, FY 2015 Regulatory Fees are Due September 24, 2015, *Public Notice*, DA 15-989 (Sep. 2, 2015).

Filer will be open on [Sunday] September 2, 2015 until 6:00 pm, Eastern Daylight Time. Fee Filer will not be available again until Tuesday, September 8, 2015.” The *Public Notice* admonished that “regulatory fee payments must be RECEIVED by the Commission no later than 11:59 PM, Eastern Daylight Time, on September 24, 2015.”³ Later, on September 11, 2015, the Commission again announced September 24, 2015, as the deadline for paying the FY 2015 annual regulatory fees.⁴ Even so, by September 24, 2015, the Commission had not received full payment of Licensee’s regulatory fee. Indeed, Licensee’s payment of the fee and assessed late payment charge was not received until September 28, 2015.

On October 5, 2015, we received Licensee’s *Request* that asserts, it (a) “attempted to login ... on 3 separate occasions between 9/1 and 9/18 and could not do so,” (b) “was unable to login during the period 9/21 – 9/25” because of “a Jewish Holiday,”⁵ (c) learned “[u]pon logging in [on September 28, 2015, that Licensee] was assessed a Late payment penalty charge of \$1,335.00,” and (d) “[p]aid the total amount ... due [o]f \$4,685.00 via Pay.gov ... as requested.”⁶

Standards

Licensees are expected to know the Commission’s rules and procedures⁷ for paying the annual regulatory fees, filing a timely and complete petition to defer payment, and filing a request for waiver. Also, Licensees are expected to know the consequences of failing to pay an annual regulatory fee in a timely manner.

In establishing the regulatory fee program mandated by Congress,⁸ the Commission set out the relevant schedules of the annual fees and established procedures for, among other matters, payment, waivers, reductions, and deferral, refunds, error claims, and penalties.⁹

Under 47 U.S.C. § 159 and the Commission’s implementing rules, we are required to “assess and collect regulatory fees”¹⁰ to recover the costs of the Commission’s regulatory activities,¹¹ and when the required payment is received late or it is incomplete, and “not excused by bank error, [to assess] a 25 percent penalty of the amount of the fee ... which [is] not paid in a timely manner.”¹² A timely fee payment is one received at the Commission’s lockbox bank by the due date.¹³

³ *Id.*

⁴ See FY 2015 Regulatory Fees Due No Later Than September 24, 2015, 11:59 pm Eastern Time (ET), *Public Notice*, DA 15-1013. (Sep. 11, 2015).

⁵ Licensee did not specify the Jewish holiday or the nature of religious observance preventing Licensee’s login for five days. Even so, we take note that in 2015, Yom Kippur commenced at sunset on Tuesday, September 22, 2015 and continued until nightfall Wednesday, September 23, 2015.

⁶ *Request*.

⁷ 47 C.F.R. § 0.406; see *Life on the Way Communications, Inc., Forfeiture Order* 30 FCC Rcd 2603, 2607 (2015).

⁸ See 47 C.F.R. § 1.1151.

⁹ See 47 C.F.R. Part 1, Subpart G.

¹⁰ Assessment and Collection of Regulatory Fees for Fiscal Year 2015, *Report and Order and Further Notice of Proposed Rulemaking*, 30 FCC Rcd 10268 (2015) (*2015 Regulatory Fee Order*); Assessment and Collection of Regulatory Fees for Fiscal Year 2011, *Report and Order*, 26 FCC Rcd 10812 (2011) (*2011 Regulatory Fee Order*).

¹¹ 47 U.S.C. § 159(a)(1); 47 C.F.R. § 1.1151.

¹² 47 U.S.C. § 159(c)(1); 47 C.F.R. §§ 1.1157(c)(1), 1.1164.

¹³ 47 C.F.R. § 1.1164.

Each year, the Commission establishes the final day on which payment must be received before it is considered late, *i.e.*, a deadline after which the Commission must assess charges that include the statutory late payment penalty required by 47 U.S.C. § 159(c)(1) and 47 C.F.R. §§ 1.1157(c)(1) and 1.1164, and additional charges of interest, penalties, and charges of collection required by 31 U.S.C. § 3717 and 47 C.F.R. § 1.1940. September 24, 2015, was the deadline for paying the FY 2015 annual regulatory fees.¹⁴ The Commission's 2015 *Regulatory Fee Order*, 30 FCC Rcd at 10286, ¶ 44, warned,

To be considered timely, regulatory fee payments must be made electronically by the payment due date for regulatory fees. Section 9(c) of the Act requires us to impose a late payment penalty of 25 percent of the unpaid amount to be assessed on the first day following the deadline for filing these fees. Failure to pay regulatory fees and/or any late penalty will subject regulatees to sanctions, including those set forth in section 1.1910 of the Commission's rules, which generally requires the Commission to withhold action on "applications, including on a petition for reconsideration or any application for review of a fee determination, or requests for authorization by any entity found to be delinquent in its debt to the Commission" and in the DCIA. We also assess administrative processing charges on delinquent debts to recover additional costs incurred in processing and handling the debt pursuant to the DCIA and section 1.1940(d) of the Commission's rules. These administrative processing charges will be assessed on any delinquent regulatory fee, in addition to the 25 percent late charge penalty. In the case of partial payments (underpayments) of regulatory fees, the payor will be given credit for the amount paid, but if it is later determined that the fee paid is incorrect or not timely paid, then the 25 percent late charge penalty (and other charges and/or sanctions, as appropriate) will be assessed on the portion that is not paid in a timely manner. [Footnotes deleted.]

Under 47 U.S.C. § 159(c)(1), if the full amount is not received at the Commission's lockbox bank by the due date, a late payment penalty of 25 percent of the amount not paid accrues automatically. Specific to payment and penalties, "[a]ny late filed regulatory fee payment will be subject to the penalties set forth in section 1.1164,"¹⁵ which provides in relevant part, "[a]ny late payment or insufficient payment of a regulatory fee, not excused by bank error, shall subject the regulatee to a 25 percent penalty of the amount of the fee ... not paid in a timely manner."¹⁶ Thus, after the deadline, the full amount due includes the 25 percent late payment penalty¹⁷ and, if the debt remains unpaid, the accrued charges of collection, interest, and penalties.¹⁸ If a regulatee tenders less than the full amount owed, it is a partial payment, which is applied to the amount owed as set forth in 47 C.F.R. § 1.1940(f)--first to the penalties and

¹⁴ See FY 2015 Regulatory Fees Due No Later Than September 24, 2015, 11:59 pm Eastern Time (ET), *Public Notice*, DA 15-1013 (Sep. 11, 2015).

¹⁵ 47 C.F.R. § 1.1157(c)(1).

¹⁶ 47 C.F.R. § 1.1164.

¹⁷ 47 C.F.R. § 1.1164 ("[a]ny late payment or insufficient payment of a regulatory fee, not excused by bank error, shall subject the regulatee to a 25 percent penalty of the amount of the fee of installment payment which was not paid in a timely manner.").

¹⁸ 31 U.S.C. § 3717.

accrued charges, and then to the principal amount owed.¹⁹ Afterwards, any unpaid portion is a delinquent regulatory fee that incurs interest, penalties, and charges of collection under 31 U.S.C. § 3717 and 47 C.F.R. § 1.1940. Moreover, until the full amount is paid or satisfactory arrangements are made, the licensee remains a delinquent debtor subject to the Commission's administrative sanctions of dismissal as set forth at 47 C.F.R. §§ 1.1164(e)²⁰ and 1.1910.

Under 47 C.F.R. §§1.1160(a) and 1.1166, a refund may be made only under specific circumstances, e.g., "[w]hen no regulatory fee is required or an excessive fee has been paid" or "[w]hen a waiver is granted in accordance with § 1.1166."²¹ Under § 1.1166, fees may be waived, reduced or deferred in specific instances, on a case-by-case basis, where good cause is shown and where waiver, reduction or deferral of the fee would promote the public interest.²² An applicant seeking a waiver of the penalty and assessed charges has the burden of demonstrating compelling and "most extraordinary circumstances"²³ to justify waiver of the penalty.

The Commission's rules at 47 C.F.R. §§ 0.401, 1.7, and 1.1166 establish both the proper location and procedures for filing waiver requests and petitioning for deferral and the consequence of dismissal for failing to comply with those rules. The Commission has designated specific offices to receive and process certain matters, thus a request for relief is *filed* only upon receipt at the location designated by the Commission.²⁴ For example, under 47 C.F.R. § 1.1166, a petition to waive a regulatory fee that is submitted without the fee payment "should be filed with the Commission's Secretary."²⁵ Filing is accomplished by mailing or otherwise delivering a hard copy of the documents to Office of the Secretary, Federal Communications Commission, Attention: Managing Director, Washington, D.C. 20554.

Discussion

We note first that Licensee failed to comply with the Commission's procedure for filing requiring delivery to the Office of the Secretary. Hence, under 47 C.F.R. §§ 0.401, 1.7, and 1.1166,²⁶ we dismiss the submission because it is *not filed*. This resolves the matter; however, as

¹⁹ 47 C.F.R. §§ 1.1940(f) ("When a debt is paid in partial ... payments, amounts received ... shall be applied first to outstanding penalties and administrative cost charges, second to accrued interest, and third to the outstanding principal."), 1.1157(c)(1), 1.1164(c).

²⁰ 47 C.F.R. §§ 1.1164(e) ("Any pending or subsequently filed application submitted by a party will be dismissed if that party is determined to be delinquent in paying a standard regulatory fee The application may be resubmitted only if accompanied by the required regulatory fee and by any assessed penalty payment."), 1.1910.

²¹ 47 C.F.R. § 1.1160(a)(1) & (3).

²² 47 C.F.R. § 1.1166; cf. 47 C.F.R. § 1.3.

²³ *McLeodUSA Telecommunications Services, Inc., Memorandum Opinion and Order*, 19 FCC Rcd 6587, 6589, ¶ 8 (2004) (*McLeodUSA Telecommunications*) (denying the request for waiver of 25 percent penalty).

²⁴ 47 C.F.R. §§ 0.401 ("The Commission maintains several offices and receipt locations. Applications and other filings not submitted in accordance with the addresses or locations ... will be returned to the applicant without processing."); 1.7 ("pleadings and other documents are considered to be filed with the Commission upon their receipt at the location designated by the Commission."); *Champion Communication Services, Inc., Order on Reconsideration*, 15 FCC Rcd 23782, 23783-84 (WTB 2000).

²⁵ 47 C.F.R. § 1.1166(a)(2).

²⁶ 47 C.F.R. § 1.1166(a) ("Requests for waivers ... or deferrals will be acted upon by the Managing Director with the concurrence of the General Counsel. All such filings within the scope of the fee rules shall be filed as a separate pleading and clearly marked to the attention of the Managing Director. Any such request that is not filed as a separate pleading will not be considered by the Commission.").

a matter of administrative economy, we look to the substance of the *Request*, and for the reasons discussed next, we deny.

Fee Filer was available to accept payment transactions on September 2, 2015, and from September 8 to September 24, 2015 at 11:59 pm, which was the announced deadline for paying regulatory fees.²⁷ Even so, Licensee failed to complete payment by the deadline, thus we imposed the statutory 25 percent penalty.²⁸

Licensee asserts it “attempted to login ... on 3 separate occasions between 9/1 and 9/18 [but] could not do so,” and that it did not “login during the period 9/21-9/25,” because of a Jewish holiday. Finally, Licensee asserts, on September 28, 2015, it paid the delinquent fee and the assessed penalty. Licensee did not include evidence supporting these asserted efforts, even so these assertions do not present a legal excuse or demonstrate extraordinary compelling circumstances.

For example, Licensee’s assertion of three failed attempts, one or more of which may have been attempted during the announced period for maintenance service between 6:01 pm, Sunday, September 2, 2015, and Tuesday, September 8, 2015, does not present a compelling circumstance that Licensee was prevented from paying the fee in a timely manner before 11:59 pm, September 24, 2015. As noted above, the Commission’s Fee Filer system is available 24 hours a day, seven days a week. Even though Fee Filer was undergoing announced scheduled maintenance from 6:00 pm on September 2, 2015, until Tuesday, September 8, 2015, Licensee nonetheless had 18 days to complete payment. Moreover, Licensee made the decision to forego an attempt to access Fee Filer for six days between September 19 and 24, 2015. That was a matter within its own control,²⁹ and for that decision, it bears the consequence.

The penalty required by 47 U.S.C. § 159(c)(1) and charges required by 31 U.S.C. § 3717 are not limited to situations where the failure to pay was knowing or willful. Indeed, neither the statute nor the Commission’s regulations contemplates a waiver of or reduction in the late payment penalty based on matters such as an employee’s inability to perform duties, the amount of time after the deadline within which the regulatee satisfies its payment obligations, or the absence of a reminder notice. The penalty for late payment applies even to situations where the deadline is missed by a short period of time.³⁰ For example, events and circumstances arising from the sale or transfer of a business, such as winding up financial affairs with reduced staff members, are not extraordinary. Moreover, the penalty required by 47 U.S.C. § 159(c)(1) is not limited to situations where the failure to pay was knowing or willful. If it is to be waived, it is “only in the most extraordinary circumstances,”³¹ which Licensee does not establish.

²⁷ See FY 2015 Regulatory Fees Due No Later Than September 24, 2015, 11:59 pm Eastern Time (ET), *Public Notice*, DA 15-1013. (Sep. 11, 2015).

²⁸ 47 U.S.C. § 159(c)(1); 47 C.F.R. §§ 1.1157(c)(1), 1.1164.

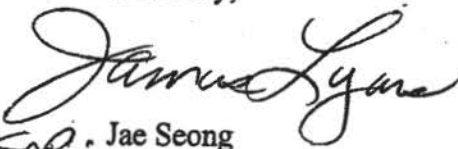
²⁹ NTT America, *Memorandum Opinion and Order*, 21 FCC Rcd 8088, 8090, ¶ 6 (2006) (“untimely payment of [Licensee’s] regulatory fee was the direct result of [Licensee’s] decision to change its software system shortly before the regulatory fee was due, which was a matter completely within its own control.”).

³⁰ See *XO Communications, LLC* (OMD, Nov. 10, 2010).

³¹ *McLeodUSA Telecommunications, supra*.

If Licensee has any questions concerning this matter, please call the Revenue & Receivables Operations Group at (202) 418-1995.

Sincerely,


FOR: Jae Seong
Acting Chief Financial Officer